ORIGINAL

No. 96-6133

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden, Pontiac Correctional Center,

Respondent.

On Petition For A Writ Of Certiorari
To The
United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this collateral litigant is entitled to certiorari on the grounds of an alleged structural defect at trial where he concedes that no bribe was sought or received at his jury trial, and where there is absolutely no evidence of judicial bias, corruption or impropriety during petitioner's trial or sentencing hearing?

2. Whether petitioner's failure to obtain an evidentiary hearing was based solely on his failure to make a substantial or colorable showing that a hearing would result in a finding that a constitutional violation affected the verdict?

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PRAYER

Respondent asks this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered April 12, 1996, insofar as petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996). A copy of the opinion is included in petitioner's appendix.

REASONS FOR DENYING THE WRIT

I.

THIS COLLATERAL LITIGANT IS NOT ENTITLED TO CERTIORARI ON THE GROUNDS OF AN ALLEGED STRUCTURAL DEFECT WHERE HE CONCEDES THAT NO BRIBE WAS SOUGHT OR RECEIVED AT HIS JURY TRIAL, AND WHERE THERE IS ABSOLUTELY NO EVIDENCE OF JUDICIAL BIAS, CORRUPTION OR IMPROPRIETY DURING PETITIONER'S TRIAL AND SENTENCING HEARING.

The petitioner's first contention in support of certiorari is that the United States Court of Appeals for the Seventh Circuit disregarded this Court's holdings in Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 237 (1927), and its progeny by not granting habeas relief in the instant case. (Pet. at 10-16) Petitioner is mistaken, however, because there is not and never has been any evidence of a "structural defect" in this case. Petitioner bases his structural defect argument solely on the uncontestable fact that his trial judge was convicted of racketeering in connection with other criminal cases. Petitioner goes on to argue that that activity necessarily tainted his own trial to such an extent that due process required the granting of habeas relief. As even the dissent conceded below, Judge Maloney, whatever his failings in other cases, did not solicit a bribe from either defendant in this one, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. Accordingly, the panel majority perceived the petitioners as advocating a new rule that would invalidate "a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in

other cases." Bracy v. Gramley, 81 F.3d 684, 689 (7th Cir. 1996). Since this proposal was without benefit of precedent, the majority declined to apply it, relying on Teague v. Lane, 489 U.S. 288 (1989). Id. The court below recognized that to accept petitioner's argument "would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes." Id. In discussing the plausibility of petitioner's theory that Maloney would be especially harsh to defendants in cases where no bribes changed hands, "to right the balance as it were--it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take." Id. at 689-690. The court below acknowledged that it was engaging in speculation on this point, but noted that "the defendants are speculating too." Id. at 690. In fact, a review of the transcript failed to show "that there were so few rulings in their favor that the judge must have been biased in favor of the government." Id. at 690 (emphasis in original). Nor did the Supreme Court of Illinois find fault with the rulings. Id. Accordingly, the court below refused to treat the case on a par with one where the trial judge had actually accepted a bribe. That being the case, "ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process." Id.

This holding is in complete accord with the decisions of this Court that emphasize the preeminence of state court review, the importance of finality and the extraordinary and limited remedy offered by the writ of habeas corpus.

This Court explained in Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S.Ct. 3383, 3391-92 (1983), that habeas review in a capital case is no different from habeas review in a non-capital case. Capital defendants are not entitled to special scrutiny. This Court cautioned against undue intrusion on capital review. Direct appeal must remain the primary avenue for review of a conviction and death sentence. When the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and death sentence. Subsequent federal court review is secondary and limited. Barefoot, 463 U.S. at 887-88, 103 S.Ct. at 3391-92.

Under this framework, then, the court of appeals was correct in noting that "(t)he fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence." Bracy, 81 F.3d at 689.

Petitioner, however, attempts to create the appearance of a schism with this Court's opinions in, inter alia, In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955), and Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927). (Pet. at 10-14) In Murchison, however, the bias was self-evident in the petitioner's own case: the same judge who had sat as the "judge-grand jury" before which witnesses had testified later

presided at a contempt hearing wherein the same witnesses were adjudged in contempt for their conduct before the judge in his role as grand jury. Murchison, 349 U.S. at 136-139. Similarly, in Tumey, this Court found that judges who had a "direct, personal, pecuniary interest in convicting the defendant who came before him for trial" presided in violation of due process. Tumey, 273 U.S. at 523. The finding of bias in Tumey was a matter of record and undisputed by the parties. In contrast, it is undisputed in the instant case that the trial judge had no direct, personal, pecuniary interest in reaching a conclusion against petitioner or his cohort. This distinction is crucial, for without the direct evidence of the existence of bias in this precise case, the doctrines of finality and comity dictate that habeas relief not issue for speculative reasons only. Mere speculation cannot be used to undermine presumptively valid jury verdicts, verdicts that are independent from and insulated from the trial judge. The court below recognized the clear distinction between Tumey, et al., and the instant case, and was scrupulous in its observation of the proper limits of a habeas court. Regardless of Judge Maloney's undeniable misconduct in other cases, that misconduct was not present in the instant case. At best, petitioner can speculate that there was an indirect effect. Even the dissent conceded, however, that:

> . . . one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character.

Bracy, 81 F.3d at 698 (Rovner, J., dissenting). This Court should agree with the majority, therefore, and decline to impute the taint of corruption to a case where it is conceded that no corruption was present. This not only avoids the domino effect of the inevitable invalidation of 6,000 judgments, multitudes of which, like the instant case, concern defendants whose guilt is overwhelming, but also, and more importantly, recognizes that there was no reason to suppose that this trial was "an unreliable test of the issues presented for decision in it." Bracy, 81 F.3d at 688-689. Petitioner and his co-defendant received a fair trial, and their convictions were derived from the compelling evidence of guilt, not from some intangible scent of bias. The Constitution requires no more.

Petitioner also argues in support of a petition for a writ of certiorari that the court of appeals improperly invoked, sua sponte, Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), as an alternative basis for disposition. (Pet. at 15) Petitioner argues that the rule he advanced in this case--that habeas relief is justified in a case where a judge is known not to have taken a bribe, simply because he took bribes in other cases--is not new for purposes of Teague, but was in fact dictated by prior precedent. (Pet. at 15-16) First, it is uncontested that the court below could invoke Teague sua sponte. Caspari v. Bohlen, ___ U.S. ___, 114 S.Ct. 948, 953 (1994). Even the dissent below conceded as much. Bracy, 81 F.3d at 703, citing, inter alia, Goeke v. Branch, ___ U.S. ___,

___, 115 S.Ct. 1275, 1276 (1995). This is not compromised by the fact that a capital case is involved, which for purposes of habeas review is treated the same as any other. See Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S.Ct. 3383, 3391-92 (1983). As to the correctness of a Teague invocation, Respondent contends that it was entirely proper, for petitioner was advocating a radical departure from Tumey v. Ohio and its progeny.

When the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and sentence. Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92 (1983). This Court has acknowledged that the "writ strikes at finality," one of the "law's very objects." McCleskey v. Zant, 499 U.S. 467, 491, 111 S.Ct. 1454, 1468 (1989). The writ of habeas corpus is an extraordinary remedy and upsetting the finality of judgments should be countenanced only in rare instances. See, e.g., Brecht v. Abrahamson, 507 U.S. ___, ___, 113 S.Ct. 1710, 1719 (1993) (noting that "the writ has historically been regarded as an extraordinary remedy"). These important goals of comity and finality were furthered in Teague v. Lane, 489 U.S. 288 (1989), which announced the now-familiar principle that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. "A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 301 (emphasis in original).

As the court below noted, no precedent had been offered extending Tumey and progeny to cases where the bias was not directly confined to the defendant's own case. Bracy, 81 F.3d at 689. The court noted that the proffered rule lacked "a secure grounding in prior cases." Id. Petitioner tries to argue, however, that prior precedent dictates the rule based on a defendant's general right to a fair trial. (Pet. at 13) If one looks to broad rights such as the right to a fair trial, however, the new-rule inquiry is rendered "meaningless if applied at this level of generality." Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 2828 (1990).

The Seventh Circuit has been in lockstep with Sawyer on this point. In a recent Illinois capital case they held:

> All procedural rights of criminal defendants evolve out of principles as old as the Constitution and often much older. Teague v. Lane would have no domain of application if limited to cases in which the Court had created a right that had no antecedents in the traditions of Anglo-American criminal procedure.

Stewart v. Gramley, 74 F.3d 132, 134 (7th Cir. 1996) (cert. denied, 1996 U.S. LEXIS 5044, 65 U.S.L.W. 3258 (U.S. 1996)). Accordingly, no error arose by the application of Teague to the instant case.

II.

PETITIONER'S FAILURE TO OBTAIN AN EVIDENTIARY HEARING WAS BASED SOLELY ON HIS FAILURE TO MAKE A SUBSTANTIAL OR COLORABLE SHOWING THAT A HEARING WOULD RESULT IN A FINDING THAT A CONSTITUTIONAL VIOLATION AFFECTED THE VERDICT.

As a second ground in support of certiorari, petitioner argues that the court below improperly held him to a new

standard concerning the showing necessary to obtain an evidentiary hearing on habeas review, a standard at odds with this Court's opinion in Townsend v. Sain, 372 U.S. 293 (1963). (Pet. at 17-23)

The majority, contrary to petitioner's suggestion, was in lockstep with Townsend v. Sain, 372 U.S. 293 (1963), when it held that no hearing was required in this case on this claim. Townsend requires an evidentiary hearing on allegations of newly discovered evidence only when the allegation is "substantial." Townsend, supra, 372 U.S. at 313. Nellum's recantation did not exonerate the petitioners in any way. Bracy v. Gramley, 81 F.3d 684, 692 (7th Cir. 1996). The recantation went to collateral details only, and if they had been fully aired at a hearing (and believed) a new trial was still not warranted. Id. at 693. At best, testimony that revealed Nellum's penchant for changing his story (but not as to the central question of Bracy and Collins's guilt), would have only undermined Nellum's credibility, while leaving intact the core of his testimony. Id. at 694. Contrary to petitioners' suggestion, the majority clearly factored in the aborted deposition, taken years after trial, that was a repetition of the recantation. Id. at 692. Perhaps most important, the majority recognized that there was no reason to suppose Nellum's recantation was either genuine or material. Id. at 694. At no time has the recantation ever been corroborated, despite the undoubted energy of petitioners' counsel. Id. This deficiency continues today, and

petitioners' attempts to establish "partial corroboration" are not persuasive. Properly read, the opinion does not regard the recantation as genuine. The entire tenor of the opinion, and especially the passage on page 694, regards the recantation with deep suspicion. Id. at 694. Even if deemed genuine, however, petitioners have not shown how the recantation is material. Nellum never exonerates either petitioner. Changes in details like the disposal of murder weapons should not have resulted in an evidentiary hearing, because Nellum's prevarications on such long-past minutiae would not have affected the verdict. The panel concluded that the core of his testimony would not have been affected after all, and that "core", of course, was corroborated by the other witnesses and by the guns. The partial recantation, therefore, did not meet the "substantial" threshold of Townsend v. Sain, and the panel majority's treatment offers no reason for certiorari.

Moreover, petitioner is unfounded when he suggests that the court below established a new or different standard for claims based on evidence discovered "many years after his conviction." Pet. at 17, et seq. On the contrary, the court of appeals held quite clearly that the lapse of time was not a reason for the refusal to allow a hearing:

> The circumstances of Nellum's recantation, the strength of the original evidence, and the fact that the core of his testimony was not recanted persuade us that the request for an evidentiary hearing was properly denied.

Bracy, 81 F.3d at 694. The court's dicta concerning the lapse of time is in perfect accord with this Court's pronouncements

on the desirability of finality in the context of state court criminal judgments. See Barefoot and Brecht, Issue I, supra.

The court of appeals did not hold this petitioner to an impossibly high standard, and said as much in the opinion:

> (I)t cannot be a condition of the grant of . . . (an evidentiary) hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing.

Bracy, 81 F.3d at 692. Unfortunately for the petitioner, the court went on to state:

> But equally it cannot be enough that the petitioner has some new evidence.

Id. (emphasis in original). The court below sensibly recognized that the new evidence was collateral and unlikely to be dispositive, and did not justify what amounts to "an extraordinary interference with the finality of the criminal process." Id. at 693. Since Nellum's collateral recantation would not exonerate Bracy or his co-defendant even if believed, a hearing to develop it further was unjustified. Accordingly, the court below was justified in affirming denial of a hearing based on a recantation that had no assurances of being genuine and that certainly was not material. This lack of materiality defuses the use of Nellum's original testimony on collateral points, since it could not have affected the verdict. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976); Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). As the court below correctly found:

> The evidence of Bracy's and Collins's guilt was very powerful and evidence brought out

> at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury.

Bracy, 81 F.3d at 694.

Although petitioner and his co-petitioner have never shown or proved that the prosecution knowingly allowed Nellum to perjure himself, and Respondent continues to attribute the recantation solely to Nellum's own unknown agenda and membership in "the criminal demimonde," Bracy, 81 F.3d at 694, it is also clear that the recantation was to collateral matters only and that the false portion of testimony, if any, was immaterial. Certiorari, therefore, is inadvisable under the fact-specific nature of the claim and the fact that the claim, even if true, did not affect the reliability of the verdict.

Finally, it is worth noting that the dissenting judge based her opinion solely on the judicial bias issue, and so petitioner's remaining issue in support of certiorari does not carry the favor of even one panel member. Respondent maintains that the petition must be denied, as the majority opinion correctly analyzed and decided the issues before it, and properly affirmed the denial of the petitions for writs of habeas corpus.

CONCLUSION

WHEREFORE, Respondent asks this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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November 8, 1996

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CERTIFICATE OF SERVICE AND STATEMENT OF TIMELY FILING

I, Steven J. Zick, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served twelve (12) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

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2.) That all parties required to be served have been served, to wit:

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I further state that this mailing took place on November 8, 1996, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
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96-6133

ORIGINAL

CERTIFICATE OF SERVICE

I certify that on September 24, 1996, I caused to have mailed by U.S. Postal Service a copy of the foregoing document to the opposing party's attorney:

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